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Private enforcement of competition law in the EU: Actors behind its development

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1. Introduction

The system that enforces EU competition law as well as the logic behind it is of a specific nature worth diving into. Private enforcement is simply put a type of enforcement through which an individual enforces competition law before a national court – against another individual. Such a type of enforcement comes to life either through invoking the nullity of an agreement, injunction-wise or by claiming damages compensation. Private enforcement differs from the public type of enforcement, which is performed by the Commission as well as the National Competition Authorities (NCAs) who deploy their powers in that regard. What both types of enforcement hold in common is the fact that they both in principle pursue the goal of effectiveness in respect to the competition on the market, hence an economic (public) goal. Still, the nature of private enforcement of EU competition law holds more than that. And it drives its origins all the way from the hardly ever overestimated *Van Gend en Loos*¹ and its direct effect principle. Thus, the story of private enforcement of EU competition law is also the one of the rights conferred by the Treaty to individuals as part of their 'legal heritage', which are to be protected by national courts.

The story officially marked its beginning in 1970s in *BRT v. Sabam*² which made the Articles 101 and 102 TFEU³ explicitly produce direct effect in relations between individuals. In 2001 in *Courage*⁴, the ECJ expressed the existence of a right to claim damages against another individual, due to an infringement of competition Articles 101 and 102 TFEU. *Courage* was a horizontalisation of the phenomenon of obtaining reparation of damages in EU law, yet despite being the 'younger brother' of the *Francovich*⁵ and *post*⁶ cases, its massive effect remained tied to competition law specifically. For private enforcement of EU competition law this was a boost that helped

¹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

² Case 127/73 *BRT v. Sabam* [1974] ECR 51.

³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereinafter TFEU).

⁴ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

⁵ Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Republic of Italy* [1991] ECR I-5375.

⁶ See Joined Cases C-46/93 & C-48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I1029, Case C-392/93 *British Telecommunications* [1996] ECR I-1631, Joined Cases C-178, 179 and 188-190/94 *Dillenkofer and Others* [1996] ECR I-4845.

the jump on a train destined to reach 'modernisation of EU competition law enforcement'. Coincidence or not, the ECJ pushed the national judges in the frontline at the time when the Commission was initiating its modernisation reforms to produce a new Regulation 1/2003 with which it finally showed readiness to enhance the role of national courts within the enforcement scheme and let go of the, until that time, ruling centralised system with the Commission itself on its highest pedestal.

Having seen private enforcement as an important pillar supporting the competition law enforcement through damages claims, as well as an important way of helping the victims of anticompetitive conduct, the Commission took the matter into its own hands. Its initiatives included studies on national legal conditions governing damages actions as well as papers filled with detected problems which divergent solution within Member States produced, and possible solutions. In that regard, private enforcement waited more than a decade counting from *Courage*, for its first positive regulatory measure. Directive on rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU, finally found its place in the world of EU competition law in 2014 (further: Damages Directive)⁷.

For a better understanding of the complicated world of EU competition law enforcement, the thesis will first of all try to draw lines within the enforcement scheme to make the differentiation between private and public enforcement evident. Private enforcement has been praised as well as made subject of critics to the point of discussions if we need it at all. The latter question I find irrelevant considering recent developments, but what I find beneficial is understanding the effects it has within the enforcement world compared to public enforcement, both on the infringers as on the victims. Moreover, what I find crucial is to acquaint oneself with the nature of its relationship with public enforcement. Public enforcement marks a strong element in this environment and its long dominance over private enforcement *ante* modernisation is strongly felt in the current discussion on private enforcement development.

⁷ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (hereinafter Damages Directive).

Private enforcement of EU competition law, more specifically of Articles 101 and 102 TFEU, has experienced a fascinating path of development carved both by interpretation of the Treaty rules by the European Court of Justice as well as by activism on the side of the Commission. The thesis will follow the line of developments to demonstrate the influence exercised by both agents of the Union on national legal systems, which in the whole pursuit of modernisation and effectiveness of the EU competition law enforcement, are left with the obligations to respect the principles set in the ECJ case law and to finally implement the secondary law of the EU. Hence, the obligation to change their legal landscape in accordance with the set internal market policy of the EU.

Finally, the thesis makes an overview of Commission's initiatives and finally tackles the Damages Directive. Besides shortly going through its aims and content, I will try to make observations to find out the implications of both its birth circumstances as well as the Commission's choice of points it decided to regulate by this instrument, especially taking into account the interplay of public and private enforcement.

Considering all the above points, it is my presumption that the positive harmonisation in this important part of private enforcement will continue. Since it touches upon the legislative traditions of Member States, I do not believe we can anticipate a great speed of legal developments on the EU level. The Commission will have to compromise in each step, and until taking the legally binding measures, it will assist the national courts with a developed soft law. Naturally, for all the matters outside of the ring regulated by EU rules, equivalence and effectiveness will apply, forcing me to make a presumption on the growing case law in which the ECJ will act.

One is sure, further developments as well as the implementation results will be greatly anticipated and most interesting to witness.

2. Defining private enforcement of EU competition law

2.1. The notion of private enforcement

The nature of the Articles 101 and 102 TFEU makes them eligible for having direct effect⁸, which supports their direct applicability before national courts of the Member states. A violation of Treaty's antitrust⁹ articles will give rise to rights and obligations of a private law nature, which could trigger an antitrust litigation of a private nature, as a mechanism to sue upon the rights and obligations and enforce antitrust law. The claims find their basis in private law, and are litigated within a civil procedure.¹⁰ For that purpose, 'private enforcement' refers to the application of the articles 101 and 102 TFEU by individuals or undertakings, alone or in combination with other provisions of Union or national law, before the national courts.¹¹

The debate regarding the direct effect of Union law does serve the public interest of safeguarding the full effectiveness of the competition rules and thereby the undistorted competition in the internal market, yet it is primarily about better safeguarding the rights of private parties. Therefore, to refer to the direct application of the competition rules in a private litigation between individuals a more appropriate terminology in that sense might be private or civil remedies as civil consequences of antitrust violations. The private law notion of nullity in paragraph 2 of Article 101 TFEU gives a party the possibility to escape a contractual obligation by invoking the nullity of a contract or a

⁸ The European Court of Justice articulated the doctrine of direct effect already in 1963 in the famous *Van Gend en Loos*, which meant taking a bold first step of legitimating private enforcement of EU law. ECJ established initial conditions for a Treaty Article to have direct effect, which have been loosened in the years since the ruling. Current position narrowed them to clarity, precision and unconditionally to be invoked by individuals.

⁹ Often, the term antitrust law is used as a synonym of competition law and, at the EU level, competition law encompasses not only Articles 101 and 102 TFEU but also rules on State aid (Articles 107-109) and merger control. The European Commission, however, often uses the term 'antitrust' as a subcategory of competition law, specifically denoting Articles 101 and 102 TFEU.

¹⁰ Simon Vande Walle, *Private Antitrust Litigation in Europe and Japan: A Comparative Perspective* (Maklu-Publishers & Simon Vande Walle 2013) 30.

¹¹ Veljko Milutinovic, *The 'Right to Damages' Under EU Competition Law: from Courage v Crehan to the White Paper and Beyond* (Wolters Kluwer International 2010) 14.

clause. Also, a party may base a claim for restitution on alleged nullity.¹² Quite often a party may want to seek an injunction, either under Article 101 or under Article 102, to bring anti-competitive conduct to an end or to enforce a contract. Finally, damages actions are brought against the infringer of the law to seek a monetary award to compensate the victim for the harm it has suffered.¹³ Each of the private law actions can be taken before a national civil court or before arbitrators, as a shield (seeking avoidance of anticompetitive contractual obligations) or as a sword (challenging anticompetitive behaviour), be it as the core issue or just as one of various arguments raised by the plaintiff or the defendant.

2.2. Different enforcement agents of EU antitrust rules

In the EU competition law realm, the enforcement of the competition rules is predominantly an administrative one¹⁴. The European Commission clearly takes place on the peak of the public enforcement architecture, driving its competence to enforce competition rules from the Treaty itself¹⁵. Regulation 17/62¹⁶ and Regulation 1/2003¹⁷ fleshed out the nature of the basic Treaty competence, specifying Commission's investigatory powers¹⁸, the power to impose fines on infringers of Articles 101 and 102 TFEU as well as to impose behavioural and even structural remedies¹⁹. In addition, EU is enriched with twenty eight national competition authorities (further: NCAs) which

¹² Ibid 18.

¹³ Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' COM (2005) 672 final 3 (hereinafter Green Paper).

¹⁴ Milutinovic (n 11) 11.

¹⁵ TFEU [2012] OJ C326/47, art 105: '... the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.'

In addition to these capacities, Article 103 TFEU allows the Commission to exercise its competence to propose EU legislation in this field (this is the specific 'competition competence'). Article 105(3) TFEU vests the Commission with a (secondary) legislative competence to enact regulation to exempt categories of restrictive agreements (so called block – exemption regulations).

¹⁶ Council Regulation (EEC) 17/62 implementing Articles 85 and 86 of the Treaty [1962] OJ 013/204 (hereinafter Regulation 17/62).

¹⁷ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (hereinafter Regulation 1/2003).

¹⁸ Ibid art 17-21.

¹⁹ Ibid recital 12.

together with the Commission form the “European Competition Network²⁰, a central level of the EU competition law enforcement. This network is characterised by the exchange of information and joint action, which adopts best practices. Most importantly, the network functions on the principles of allocations of competences where the Commission is clearly set in a leading role. It has the authority to pre-empt NCAs both in terms of competence to decide a matter (by seizing a case and relieving the NCAs of their competence) and by deciding the substance of a case in a manner that pre-empts a contrary decision by a NCA.²¹

The third, already mentioned enforcement agent, is the individual (in most cases, a company) that acts before a court of law or arbitral panel.²² In terms of the private enforcement, it is the individual who engages in a private litigation either as a plaintiff or as a defendant, which leads to some sort of civil sanction against the offender. It is worth noting that individuals are also able to ‘act’ before the Commission and some NCAs (‘privately triggered public enforcement’). However, a mere intervention of a party in a public enforcement litigation does not make it a private one. Also, private enforcement will still be defined by reference to the civil litigation, notwithstanding the fact that a national antitrust authority, or, indeed, the Commission, may intervene as *amicus curiae*.²³ The litigation in such cases will basically retain the characteristics of private enforcement, but with some additional elements of public enforcement.²⁴

Finally, it is important to take a view of from the subsequent angle. It must be noted and emphasized that the notion of private enforcement advocates the competence of Member states’ national courts (primarily civil/commercial courts – depending, to the greatest extent, on the organisation of the courts in the Member States²⁵) to apply the antitrust Treaty provisions in their entirety. Although such competence might seem as

²⁰ Ibid recital 15.

²¹ Milutinovic (n 11) 13. See also Regulation 1/2003, art 5, 11-14, 16(2).

²² Milutinovic (n 11).

²³ Commission, Commission Notice 2004/C on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54: ‘In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case.’

²⁴ The Commission has never distinguished such categorisations. In Commission, Commission MEMO/05/489 ‘European Commission Green Paper on Damages for Breach of EC Treaty Antitrust Rules—Frequently Asked Questions’ [2005] <http://europa.eu/rapid/press-release_MEMO-05-489_en.htm?locale=en> accessed 1 April 2016, it appears to accept damages, restitution, injunctions, nullity of a contractual relationship, as forms of ‘private enforcement’.

²⁵ Milutinovic (n 14).

a logical derivative of direct effect which these provisions possess, that has not always been the case.²⁶ A shift from a centralised to a decentralised EU competition law enforcement, made national judges not only share the burden of forcing EU antitrust rules compliance together with the Commission and National competition authorities, but also bear the responsibility to protect the rights individuals derive from their direct effect.

2.3. Relationship between private and public enforcement

It is now evident that both private and public enforcement form a part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them²⁷. Compared to the characteristic feature of the administrative, 'public' enforcement which gives the ability and responsibility to both the Commission and the NCAs to apply EU competition law in individual cases, within the private enforcement system, in terms of the fora involved, it is a civil court through which the enforcement will occur. Following *BRT v. Sabam* and *Delimitis*²⁸ judgement and in particular Regulation 1/2003, the enforcement of Articles 101 and 102 TFEU is established as a system of 'parallel competences', a parallelism which operates between public enforcers (Commission and NCAs) and national courts.

As will be seen in subsequent chapters, the elements of public enforcement influenced the development of private enforcement and to an extent they continue to dictate the course of further debate on the evolution of the private side of the enforcement arena as well as the very competences of the actors involved. It is therefore important to distinguish different agents enforcing antitrust rules as well as the consequences deriving from their acts in each enforcement type, simultaneously taking a glimpse of

²⁶ Regulation 17/62 gave the Commission a monopoly, the exclusive competence to apply Article 101(3) TFEU) and give individual exemptions (a power to declare 101(1) TFEU inapplicable pursuant to Article 101(3) TFEU). Although it was in the 1974 that ECJ established the principle of direct effect of Articles 81 and 82, the national courts had to wait for the Regulation 1/2003 to have the centralised notification and authorisation system be replaced by a directly applicable exception system. Hence, to be competent to apply Articles 101 and 102 TFEU in their entirety.

²⁷ Green Paper (n 13).

²⁸ Case C-234/89 *Delimitis v. Henninger Bräu* [1991] ECR I-935.

the enforcement tools on disposal depending on the chosen fora. Such an overview will be helpful to understand the objectives pursued by public and private enforcement respectively as well as the way in which they both contribute to the effectiveness of the enforcement system.

2.3.1. Difference and complementarity

Public enforcement is the cornerstone of the EU system of competition law but the view is that (only) a combined enforcement action by the Commission, the national competition authorities and the national courts will strengthen the impact of EU competition rules²⁹. This invites one to almost aggressively question the manner in which that actually happens. From a purely competition law perspective, it pursues three systematically different, yet substantively interconnected, objectives.³⁰ The first being injunctive (aimed at ending the infringement), the second objective aimed to reach a restorative or compensatory justice and the third one focused on punishing the perpetrator and deterring him and others from committing future violations. Can it be said then for both public and private elements of antitrust law enforcement to be approaching the same objectives, simply from different angles? Are both therefore just two sides of the same (effective) enforcement coin or are there traces of a hierarchical relationship? In that regard, it is particularly interesting to briefly examine how the two tides of competition law enforcement conduct themselves when 'motivated' by a private actor, a direct or indirect victim of an antitrust breach.

Evidently, the actor may call upon national courts to protect his rights under Articles 101 and 102 TFEU and privately enforce EU competition law rules in proceedings against another private individual.³¹ Such recourse in fact remains a practical possibility regardless of the enforcement powers of the Commission and the NCAs³², and even if

²⁹ Mario Monti, 'Effective Private Enforcement of EC antitrust law' opening speech in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2001) 3.

³⁰ Assimakis P. Komninou, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008) 7.

³¹ National courts can also be called upon by private parties to judicially review the legality of a decision made by the National Competition authority. Such administrative judicial review proceedings attribute such a role to the national courts which cannot be deemed to constitute 'private enforcement'.

³² Milutinovic (n 14).

the individual finally decides to bring his case before such a public authority. In the enforcement starting at EU level, an individual may want to file a complaint with the Commission, make his views known in a formal procedure³³ and demand the alleged violation to be stopped.³⁴ For that purpose, the Regulation 1/2003 set Commission's investigation powers in two main instruments: requests for information (Article 18) and inspections (Articles 20 and 21)³⁵. In addition to the latter, when dealing with a case, the Commission may gather information by itself or rely on the investigatory powers of the NCAs.³⁶ Both agents are involved in the Competition Network (ECN) forum where they can cooperate³⁷. Meaning that, if a private actor opts for a complaint to an administrative authority, he can highly benefit from ECN's wide transnational investigative powers and substantial financial and other resources. A recourse to a claim in a private litigation where the individual has to prove the infringement and bear the costs of the proceeding, now seems to be simply put, more expensive and more complicated compared to filing an administrative complaint and just waiting for the public authority to act. This logical path is hard to blame. Courts are rarely given adequate powers of discovery so they are left with poor means to gather and handle evidence. In addition, antitrust cases boil with complexity, they are resource and time consuming, both of which national courts can seldom deploy, 'at least as long as the same court is equally required to handle other cases of civil and/or commercial matter.'³⁸ Consequently, a private individual could rely in his claims on the facts and findings of infringement previously established in a public enforcement litigation. To pursue his own private interests in a subsequent private litigation, a private actor will most likely just take a 'free ride' on the back of public authorities and private

³³ See Commission, 'Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the Treaty' [2004] OJ C101/65.

³⁴ Regulation 1/2003, art 7.

³⁵ Wouter P.J. Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 130.

³⁶ Regulation 1/2003, art 11(1) provides generally: 'The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.' Cooperation modalities have been further developed in the Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' [2004] OJ C 101/43.

³⁷ The cooperation could include: informing each other of new cases and envisaged enforcement decisions; coordinating investigations, where necessary; helping each other with investigations; exchanging evidence and other information; and discussing various issues of common interest.

³⁸ Francesco Munari, 'Antitrust Enforcement After the Entry into Force of Regulation No. 1/2003: The Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts' in Bernardo Cortese (ed), *EU Competition Law Between Public and Private Enforcement* (Kluwer Law International 2014) 122.

enforcement in that aspect may not seem to substantially contribute to detecting the perpetrators of competition rules, and throughout produce a deterrent effect which would repel the latter or the others from committing future violations. In the aspect of injunctions, yet another advantage of Commission's act will be attention worthy when seeking an effective EU antitrust enforcement. Although an individual can obtain an injunction before a national court as well, the Commission can order interim measures that will have effects throughout the EU³⁹, whilst the effects of a national court's measures will often be limited to the national territory.⁴⁰ Negative injunctions (cease and desist orders) but also positive orders to act may also not be overridden by a subsequent or prior national court decision.⁴¹

However, when the effectiveness of the whole EU antitrust system is evoked in the search for a corrective justice, the individual can demand a *remedial* protection and compensation (only) with his private civil actions before national courts. If we take a step back to the possibility of obtaining an interim relief, it can be noted that Regulation 1/2003 actually sets no obligations for the Commission to act upon that matter but to grant interim measures on its own initiative.⁴² In other words, a complainant cannot, strictly speaking, request the Commission to grant such an order.⁴³ Since a court is obliged to hear an admissible case brought before it, this is the forum where it might be easier for plaintiffs to obtain an injunction. Even more, in a situation where a public authority declines to take action because a case lacks 'Community interest'⁴⁴, national courts will play one vital role within the enforcement system by providing the parties with the (almost lost) opportunity to obtain remedial protection of interim relief. Going further, all the proceedings in the public enforcement venue will be focussed on the finding of an infringement by 'restriction by object', on discovering the facts which pinpoint the illegality of a conduct, but they do not focus on the actual effect there

³⁹ They will be directly enforceable throughout the EU on basis of art 288 TFEU.

⁴⁰ Francis G. Jacobs and Thomas Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective', in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2001) 197.

⁴¹ Milutinovic (n 11).

⁴² Regulation 1/2003, art 8(1).

⁴³ Milutinovic (n 11) 23.

⁴⁴ See for example case T-24/90 *Automec (No.2)* [1992] ECR II-2223 where the Court upheld the Commission's decision to refuse to conduct a full investigation into the complaint on the ground that the case did not have the required degree of 'Community interest'.

was on individuals, customers.⁴⁵ Consequently, there are remedies which both the Commission as well as most national competition authorities have no competence to grant. If the plaintiff seeks voidance or wants to raise an action for the compensation of damages he suffered, he can do so only in the national judicial fora. In that regard, since private enforcement does serve safeguarding the rights individuals derive from 101 and 102 TFEU, one can almost argue that it is mostly or even just about compensating one's restricted private economic freedom. Pursuing to remedy a violated private interest while giving little attention to the impact the transgression has globally speaking, makes a strong contrast compared to the public enforcement which is guided by the public interest of safeguarding effective competition in the common market.

2.3.2. Contribution of private enforcement to strengthening EU competition rules

At this point we run the risk of undermining the substantial contribution private enforcement has on strengthening the overall impact of EU competition rules. Rather, it would do more justice to admit to its dual antithetical functions, both private and public one, generally boosting the level of competition law enforcement as well as protecting private plaintiff's interests. That would mean that private enforcement is as well as public in its character, 'the difference comparing to the public residing in the means deployed in pursuing the public goal.'⁴⁶

Relying on instruments of civil law, especially the damage compensation, it indirectly contributes to the overall deterrence effect by adding to the punitive element of fines the additional risk of having to compensate 'private' harm.⁴⁷ In the context of a private dispute with a remedial outcome, a role in encouraging compliance a national court has should be appreciated. Even in a private litigation, the court will have to consider

⁴⁵ John Ratliff, 'Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies' in Bernardo Cortese (ed), *EU Competition Law Between Public and Private Enforcement* (Kluwer Law International 2014) 276.

⁴⁶ Paolo Iannuccelli, 'The European Court of Justice and the Shaping of Private Enforcement of EU Antitrust Law through Preliminary Rulings' in Bernardo Cortese (ed), *EU Competition Law Between Public and Private Enforcement* (Kluwer Law International 2014) 235.

⁴⁷ Komninos (n 30) 19.

economic public policy and the objectives of EU competition law in its judgment when the dispute in question has a wider impact on the market.⁴⁸ Further, private actions add to the risk of non-compliance by clearly increasing the resources available for the prosecution of competition law infringements, thus they may relieve enforcement pressure on public enforcement agencies (by allowing the Commission to concentrate on the most serious infringements), yet still elevate the likelihood of detection.⁴⁹ It has also been pointed out that private parties might be better at detecting antitrust violations than public enforcers because they operate in the market on a daily basis and therefore have better knowledge about market prices and conditions⁵⁰, as well as that they fill an 'enforcement gap' and act where public enforcers did not, for instance because public enforcement might suffer from a political interference, political pressure by certain interest groups or lack of sufficient resources.⁵¹ A contribution is also noteworthy in nurturing the overall competition culture by clarifying the law, stimulating its development and raising the awareness of the importance of compliance with antitrust rules.⁵²

What is truly eye-catching is the constitutional element of the private enforcement within the context of the general EU law itself. First of all, pursuant to the Court of Justice's interpretation of Articles 101 and 102 TFEU⁵³, individuals have been granted directly effective rights, which national courts must protect. More specifically, the Court established the right of individuals to claim damages in national courts for loss caused by violations of 101 and 102.⁵⁴ Having such a remedy implied in 101 and 102 TFEU makes it not only a part of the Union's economic constitution, but the established general principle of direct effect of Treaty's provisions makes it a fragment of a pillar important to the EU legal system. To take a civil action before a national court might mean the only complete medium through which private parties can exercise and

⁴⁸ Ibid 12.

⁴⁹ Alison Jones and Brenda Sufrin, *EU Competition Law* (5th edn, Oxford University Press 2014) 1088-1089.

⁵⁰ Vande Walle (n 10) 237.

⁵¹ Ibid.

⁵² See in that aspect Wouter P.J. Wills, *Efficiency and Justice in European Antitrust Enforcement* (1st edn Hart Publishing 2008) 50-51, who distinguishes three tasks for private antitrust litigation: (1) clarifying and developing antitrust law, (2) preventing violations through deterrence and punishment and (3) ensuring corrective justice through compensation. Komninos (n 30) distinguishes injunctive, restorative or compensatory and punitive function.

⁵³ *BRT v. Sabam* (n 2), para 16.

⁵⁴ *Courage* (n 4).

protect the rights they have been granted under the Treaty. This by itself is a sufficient reason to explain why the rationale for private enforcement does not 'erode' even when specialised agencies act to enforce the law.⁵⁵

However, an additional value could be pointed out. Namely, when citizens pursue the protection of their Union rights in the proceedings before national courts, they indirectly safeguard the interest of the Union, apart from securing their own. Thus, they become 'the principal 'guardians' of the legal integrity of Union law within Europe'.⁵⁶ Indeed, the antitrust provisions of the Treaty are deemed to be fundamentally essential not only for the duties the Union is charged with, but also for the functioning of the Internal Market itself.⁵⁷ Subsequently, encouraging private enforcement is said to bring competition rules closer to citizens and undertakings throughout the Internal Market⁵⁸. The enforcement of the rights derived thus becomes the matter of Union law and in that sense subject to its fundamental principles all actors involved are obliged to take into account and respect.

2.3.3. The nature of the private and public enforcement relationship

In the context of the effective EU competition law enforcement, one cannot escape the integration of the private and public one. Even in those circumstances, it is crucial to appreciate that both types produce very different proceedings, they are directed at different objectives and thus function differently.⁵⁹ Consequently, so different are the roles of the competition authorities on the one hand and the national civil courts on the other and they should not be confused.⁶⁰ The verticality of an administrative-public

⁵⁵ Komninos (n 30) 10. For the context of antitrust remedies in EU law see further Clifford A. Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 *World Competition* 13, 14–16.

⁵⁶ See *Van Gend & Loos* (n 1), para 13: '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [226] and [227] to the diligence of the Commission and of the Member States'.

⁵⁷ Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36.

⁵⁸ See *Monti* (n 29) 3.

⁵⁹ Ratliff (n 45) 273.

⁶⁰ Tom Ottervanger, 'Designing a Balanced System: Damages, Deterrence, Leniency and Litigants' Rights' in Philip Lowe and Mel Marquis (eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies* (Hart Publishing, 2014) 20.

enforcement, where great investigation powers are deployed to cope with an alleged complex and serious infringement to finally impose sanctions of administrative nature and serve the deterrent opposed to the horizontal civil enforcement whereby national courts as a suitable fora for solving contractual conflicts between parties to agreements and imposing remedial sanctions.

As it was demonstrated earlier, they are complementary, as indeed, one of the consequences of their interplay can be seen in that one supports the effects of the other. A definite conclusion to be drawn is that they inevitably influence each other on their path to an effective application of EU rules and principles. Such attribute to their relationship however, must and has its limitations. Within the subsequent chapters it will be visible how several tensions have surfaced within the interaction of public and private enforcement, revealing real possibilities of one actually harming the other. It is evident from the previous elaboration that neither of the enforcement venues can bear all the responsibility of antitrust rules implementation alone and successfully cover all the enforcement gaps, but also a careful balance between them must be maintained.⁶¹ Truly, to build an effective EU competition law mechanism and all it implies it will be incumbent to foster and make the most of the complementary functions and actions of its agents.

3. Historical context of private enforcement of EU competition law

Both the Commission as well as the European Court of Justice had their share in making of what seemed to be a 'domino' of changes and measures that formed the enforcement landscape and simultaneously tailored the twin notions⁶² of a system of parallel competences (meaning an interaction between public and private enforcement) and the right to claim damages. Firstly, it is first of all a prime example of rise of a Union right, more specifically the right to seek compensation for damages

⁶¹ Jones and Sufrin (n 49) 1093.

⁶² Milutinovic, „The 'Right to Damages' in a 'System of Parallel Competences': A Fresh Look at BRT v SABAM and its Subsequent Interpretation" in Philip Lowe and Mel Marquis, *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies* (Hart Publishing 2014) 342.

caused by the breach of Treaty rules and the consequences it produced when satisfying the Treaty enshrined effectiveness requirement. Secondly, historical context of private enforcement is an important part of the story of the modernisation and reform of the whole competition law enforcement system. A rather long path of development was equally magnificent as the results born out of it.

3.1. State of affairs prior to modernization

Turning back half a century ago, the enforcement architecture of EU antitrust rules, specifically competition related provisions incorporated in the Treaty, looked legally as well as culturally different than how it is in the present. In the context of (the early) private enforcement development, one can safely state that the European Court of Justice was primarily the one who acted as its catalyst. Indeed, the foundations of private enforcement actions were laid down 1974 in a seminal judgement *BRT v. SABAM* where the ECJ saved a significant place in the EU legal order for Treaty's key antitrust provisions, by virtue of the direct effect they produce. The Court applied the *Van Gend en Loos* principle⁶³ on competition law provisions, hence created a horizontal version of the direct effect doctrine. Both 101 and 102 TFEU were proclaimed to produce (direct) effects in relations between individuals, conferring them direct rights which they can invoke and defend before civil courts. Thus, not only were national courts explicitly endowed to apply the antitrust Treaty provisions, they were entrusted with an obligation to safeguard individual's rights stemming from them.

By contrast to such judicial activism empowering the private recourse of antitrust enforcement, the age of the Regulation 17/62, preceding the now applicable Regulation 1/2003, was characterised by a purely centralised enforcement model. The Commission clearly ruled in the matter while the NCAs and national courts had a largely marginalised role. Such an order of things was actually not set within the Treaty itself but was incorporated within the Regulation No. 17/62 implementing it. While a direct application of 101(2) was never questioned⁶⁴, the Regulation instrumentalised the Commission's monopoly to apply Article 81(3) of then the EC Treaty ergo 101(3) TFEU,

⁶³ See n 8.

⁶⁴ Case 48/72, *SA Brasserie de Haecht v. Wilkin- Janssen* [1973] ECR 77, para. 4.

and the corresponding system of prior notification of the agreements for which an exemption was planned to be requested. To make it clear, the provision in question provided a chance for the anticompetitive agreements to escape the net of the 101(1) TFEU prohibition if they were found to pass its three conditions test.⁶⁵ What the Regulation 17/62 did is granting sheer power solely to the Commission to apply it, isolating both the NCAs and the national courts from such possibility. Not only was the Commission the only one empowered to grant such exemptions individually, but the Regulation imposed a requirement of an obligatory notification of the agreement (again to the Commission) as a prerequisite for seeking the exemption. Interestingly enough, the text of the 101(3) TFEU just reads that the Article 101(1) 'may be declared inapplicable'. It never specified the actor who is actually entrusted with the responsibility to make such declaration. Also, worth highlighting is the fact that *BRT v. SABAM* envisaged a direct effect not discriminating between the paragraphs of competition related Treaty provisions. That clearly shows that such a solution was a conscious choice with a view of constructing a European competition law enforcement with such a degree of centralisation.⁶⁶ As previously stated, the application of antitrust provisions requires careful and complex assessment and particularly Article 101(3) TFEU was considered to demand a delicate balancing of different elements which only a central EU authority could (successfully) exercise. Such a view easily gave birth to a 'traditional belief that the exclusive responsibility of the Commission for granting exemptions is a sort of 'natural' Commission monopoly'⁶⁷, with a self-explanatory 'pedagogical' purpose of standardization⁶⁸. As a consequence, the Commission for many years showed the willingness to give priority to the handling of complaints, even

⁶⁵ TFEU art 81(3): 'The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement ... which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

⁶⁶ See Komninos (n 30) 25-26.

⁶⁷ Claus Dieter Ehlermann, 'The modernization of EC antitrust policy: a Legal and Cultural Revolution' (2000) 37 CML Rev 537, 537.

⁶⁸ See Commission, 'White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty' [1999] OJ C132, 4: 'this centralised authorisation system was necessary and proved very effective for the establishment of a "culture of competition" in Europe. It should not be forgotten that in the early years competition policy was not widely known in many parts of the Community. At the time when the interpretation of Article 85 (3) was still uncertain and when the Community's primary objective was the integration of national markets, centralised enforcement of the EC competition rules by the Commission was the only appropriate system...'

in fairly trivial matters, over certain of its other responsibilities.⁶⁹ One of the many problems such events caused was that the work volume simply increased and the Commission ended up swamped with notifications. The highly guarded monopoly over complete antitrust provisions ceased to be effectively exercised adding to the fact that such a bad allocation of Commission's resources also risked failure in detecting and punishing the most serious of infringements. In regard to private enforcement, one must note that the notification system did not protect the agreements to be challenged by civil claims before national courts. When a restrictive practice happened to be challenged in a private litigation, not only could the party to a restrictive agreement use the centralised authorisation system to avoid 101(1) TFEU and obtain legal security, but it could manipulate it to block the privately triggered proceeding. Since the Commission was the only one which could decide upon an individual exemption based on 101(3) of an agreement falling foul of 101(1) TFEU, the national court had to follow the formal requirement to stay the proceeding pending a reply from the Commission. Whether the exemption was finally granted or not was at the moment not as relevant as the fact that awaiting the Commission's decision was a long process measured in months or even years⁷⁰ so the civil proceeding itself was significantly delayed. The problem of the inability of the national court to apply 101(3) TFEU thus greatly impacted the parties- victims of the potentially unlawful agreement, and rendered difficult to obtain a remedial protection such as it was offered by for example damages actions. Such a state of affairs called for a reform which would allow the Commission to deploy its resources on discovering the most serious infringements of Union law and stimulate decentralised application of the EU competition rules by national authorities and courts.⁷¹ However, it was not until 2003 that the 'modernization' of antitrust law and a 'legal and cultural reform'⁷² came to pass.

The Commission deployed legislative reforms with Regulation 1/2003 which altered the EU competition law enforcement regime *inter alia* by recognizing the complementary role of national judiciary in the enforcement scheme by allowing them

⁶⁹ D. G. Goyder, Joanna Goyder, Albertina Albors-Llorens, *Goyder's EC Competition law* (5th edn, Oxford University Press 2009) 531.

⁷⁰ Georg Berrisch, Eve Jordan and Rocio Salvador Roldan, 'E.U. Competition and Private Actions for Damages' (2004) 24 *Northwestern Journal of International Law & Business* 585, 588

⁷¹ White paper on modernisation, point 13 of Executive Summary.

⁷² Ehlermann (n 67).

to fully apply 101 and 102 TFEU in order to for example award damages to the victims of infringements.⁷³ Both modernisation and decentralization were introduced by Regulation 1/2003⁷⁴, but regarding the latter, the abolition of Commission's monopoly over the interpretation and application of 101(3) TFEU could be said to have brought the Treaty competition law provisions back into their 'normal' decentralised state of enforcement which drives the roots from the general enforcement scheme within the EU legal order, where national courts are vested with power to implement and enforce primary and secondary European law in disputes arising within a Member State⁷⁵.

3.2. Turning the tide, creating a remedy

In *BRT v. SABAM* the Court definitely defined the direct effect of antitrust Treaty provisions and was clear about the fact that there are truly certain rights emanating from the latter. What the Court (then) did not do is ending the quest for the exact form of the rights⁷⁶ which were there for the individuals to enforce and by the national courts to safeguard, when enforcing the prominent EU antitrust rules.⁷⁷ Notwithstanding the regulatory framework which was then in force, in 2001 the European Court of Justice laid the foundation for an EU based right, or rather it confirmed the EU constitutional roots of damages actions.⁷⁸ *Courage v. Crehan* marked a shift in the EU (competition) legal order⁷⁹ when it gave birth to an EU right

⁷³ Regulation 1/2003, recital 7.

⁷⁴ Munari (n 38), 111.

⁷⁵ Koen Lenaerts and Damien Gerard, 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline' [2004] 27 World Competition 313, 318.

⁷⁶ In the times of such uncertainty, a discussion on whether a financially damaged party could recover damages given that it was damaged either by an agreement or a concerted practice breaching 101(1) and 102 TFEU, took place in UK courts. The issue was dealt with by the House of Lords in 1983 in *Garden Cottage Foods Ltd. V. Milk Marketing Board*. It is worth noting that at the time, UK courts have traditionally been unfamiliar with compensating damages caused by the breach of economic laws incorporating principles such as are embodied in Articles 101 and 102. The rights of parties under the mentioned articles were not the core of the case solving, yet the House of Lords entered into a general discussion. It was confirmed that in UK law, the cause of damages claim action is characterised as the tort of breach of statutory duty for which anyone suffering loss as a result can recover damages for such breach. The majority so no reason to argue contrary, but distinct opinions also expressed that the parties were not entirely entitled to compensation and that such of a grant might even cause an enlargement of the claimant's rights and not merely an enforcement.

⁷⁷ Milutinovic (n 62) 345.

⁷⁸ Till Schreiber, 'Private Antitrust Litigation in the European Union' (2010) 44 The International Lawyer 1157, 1158.

⁷⁹ Milutinovic (n 62) refers it as 'Courage turn', Sufrin and Jones (n 49) 1103.

to damages for compensating the harm suffered by the breach of 101 and 102 TFEU. The Court formed a connection with *Van Gend en Loos* reflecting on the rights of EU nationals arising from the EU law, 'expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes'⁸⁰, and did not fail to highlight the *Sabam* ruling establishing direct effect for competition law purposes.⁸¹ The arguments insisted upon in the ruling aimed at giving the possibility to any individual to rely on a breach of antitrust Treaty provisions to obtain a relief⁸². Its decision was centred on a reason that 'the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in the latter would be put at risk' if the remedy of damages compensation was not opened for an individual whose rights were impaired. Such an embodiment of individual's rights extracted from the latter, subsequently produced a clearer message on the obligation of national courts to ensure an effective remedial protection the individuals are entitled to.⁸³ It was now safe to say that the principle of civil liability of individuals for breach of EU law was set. It contributed to an overall legal certainty and uniformity⁸⁴ but for the competition law more importantly, pushed for a maximum effectiveness of the EU antitrust law enforcement on a national level. It is worth reminding that the Commission with all its powers has none which could award damages to individuals suffering the breach so within the context of the private enforcement of EU competition law, the tide changed in *Courage* ruling, for it placed it next to the ever dominating public enforcement. Private actions have gained recognition in the overall enforcement of EU rules and were acknowledged to play a part in maintaining the effective competition in EU.⁸⁵

⁸⁰ *Courage* (n 4), para 19.

⁸¹ *Courage* (n 4), para 23.

⁸² In *Courage v. Crehan*, the Court dealt only with an agreement hampering 101(1) TFEU, hence it was not an abuse of dominance (102 TFEU) case. Yet, it pointed out the need to provide a compensation relief for the individuals who have suffered damages due to an anticompetitive contract or by conduct liable to restrict or distort competition.

⁸³ The *Courage* ruling is filled with 'effectiveness' rationale. The latter has been stressed out by the Court in both of the areas of effective judicial protection of individual's rights stemming from EU legal order (para 25) as well as in the area of EU competition law enforcement (para 26). Being a cornerstone of the judgement, the exact meaning and aim the effectiveness principle bears in the judgement has been argued as a part of a debate concerning the application and compliance of national rules with EU rules, principles and objectives. For such a debate in the context of private enforcement see Paolisa Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?' (2008) 33 EL Rev 23, 35-36 and Renato Nazzini, 'The Objective of Private Remedies in EU Competition Law' (2011) 4 Global Competition Litigation Review 131, 139-140.

⁸⁴ Komninos (n 30) 170.

⁸⁵ *Courage* (n 4), para 27.

Courage was a more than a clear message to national courts, subsequently to national legal systems that whatever the legal position the latter takes, in principle there must be a right for compensating damages occurred when 101 and 102 TFEU are breached.⁸⁶ Whatever the structure of the national law, there should be no absolute (and general) bar to an action for damages taken by a party, not even if the latter is itself a party to the agreement violating EU competition rules.⁸⁷ A judicial enthusiasm in favour of privately triggered enforcement, specifically in relation to damages actions was confirmed in *Manfred*⁸⁸ which also revealed the matter to be more interesting and complicated for several reasons. Firstly, the latter judgement sealed the *Courage* ruling repeating to the 'effectiveness' rationale.⁸⁹ Further on, it went into a more detailed analysis of what the right for damages actually encompassed. The Court confirmed it follows from the principle of effectiveness that damages are available not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cesans*) plus interest.⁹⁰ A repeated proclamation that 'any individual'⁹¹ can claim compensation for the harm was supplemented with a requirement of an existing and proven 'causal link'

⁸⁶ Sufirin and Jones (n 49) 1101.

⁸⁷ The facts of *Courage* case, showed Mr. Crehan bringing an action in order to compensate for the loss he suffered due to a void beer tie contract he himself was a party to. English courts have generally declined to lend their aid to a party founding its actions, either in order to enforce the agreement or in this case suing for damages, on an illegal act (*ex turpi causa non oritur actio*). Consequently, Mr. Crehan was deprived of the remedy which would compensate his losses. A reference to the ECJ was then made in order to question the conformity of the mentioned principle, with EU law. Ruling that a Member state should not be absolutely depriving such an individual of a remedial protection damages actions provide, it also left a little space for a discretionary power of a national judge in deciding whether the claimant co-contractor is "significantly responsible" for the distortion of competition (para 31 and para 32). The court thus embraced a commune legal principle that 'a litigant should not profit from his own unlawful conduct, where proven'.

⁸⁸ Cases C-295 to C-298/04, *Manfredi et al. v. Lloyd Adriatico et al.* [2006] ECR I-6619.

⁸⁹ *Ibid*, para 60.

⁹⁰ *Ibid*, para 100.

⁹¹ The fact that 'any individual' can rely on breach of EU antitrust rules before a national court was already stated in *Courage*. However, such a formulation of the protective scope *ratione personae* is far from self-explanatory and clear. It can be said that *Courage* does not bear an authority in respect to the harm suffered by a third party by a breach of 101 TFEU because the facts of the case show the party to the very agreement infringing 101 TFEU who was seeking compensation. *Manfredi* differentiated in that sense that it confirmed that there is indeed a remedy for injured third parties, under the 'causal link' condition. On a more detailed analysis of the problematic the extensive formulation used in *Courage* as well as *Manfredi*, which gives the right to compensation to 'any individual' and on the protective scope of competition law statutes see Mario Monti, *EC Competition Law* (Cambridge University Press 2007) 424- 434. See also Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press 2005) 203, referring to the *Courage* ruling: 'improvident contracts are not antitrust problems simply because they were carelessly or naively made. The tenant who stupidly signs a lease permitting the landlord to vary the rent has not turned the landlord into a monopolist. To accept the contrary position turns antitrust into an engine for resolving contract disputes.'

between the harm suffered and the prohibited agreement or practice.⁹² After the lines echoing the substantive part of the conferred right, the ECJ turned to the procedural rules governing actions within the domestic legal system⁹³. *Manfredi* did not only repeat that in the absence of Union rules governing the matter a domestic legal system has to respect the twin requirement of equivalence and effectiveness.⁹⁴ It directly applied the latter into the concrete context of private antitrust litigation, making it clear that domestic rules are the one which govern the exercise of the right to compensate the inflicted harm, especially in regard to the concept of 'causal relationship'.⁹⁵ The very same principle was applied in the case specific questions regarding the national court competent to deal with damages claims⁹⁶ and related to the limitation period provided by national law in the case.⁹⁷ The specific questions referred to the ECJ all demonstrated the autonomy enjoyed by the national procedural rules and particularities of domestic judiciary system when ruling on the protection of individual's rights deriving from the Treaty itself. Even with fitting them into the borders set by the EU principles, it was evident that the individuality and autonomy of domestic law have a great potential of inhibiting successful damages claims⁹⁸ and make but a great range of obstacles hampering the development of a coherent and effective private enforcement of EU competition law.⁹⁹

⁹² *Manfredi* (n 88), para 61.

⁹³ *Courage* (n 4), para 29.

⁹⁴ *Manfredi* (n 88), para 62.

⁹⁵ *Ibid*, para 64.

⁹⁶ *Ibid*, para 72: '...in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions...'

⁹⁷ *Ibid*, para 81: 'in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.'

⁹⁸ The facts in *Manfredi* showed particularities of Italian procedural law which seemed to complicate plaintiff's actions in the litigation. A national rule under which a (short) limitation period which begins to run from the day on which the agreement or concerted practice was adopted was recognized to make it practically impossible to exercise the right to seek compensation for the harm caused (para 78). Italian procedural rules also insisted that third parties must bring their actions for damages for infringement of EU and national competition rules before a court other than that which usually has jurisdiction in actions for damages of similar value, which involved a considerable increase in costs and time (para 65).

⁹⁹ Derrick Wyatt and Alan Dashwood, *Wyatt and Dashwood's European Union Law* (assisted by Anthony Arnall, Sweet and Maxwell 1993) 842; Richard Whish, *Competition Law* (Oxford University Press 2012) 294.

4. Commission's initiatives

4.1. Green Paper and White Paper on Damages actions

Enthusiastic activism on the part of the ECJ followed by Regulation 1/2003, equipped national courts to play a more prominent role within the enforcement regime. With these developments as a booster, the Commission continued to aim at more effective private enforcement. Despite the fact that damages actions are not the only way through which private enforcement materialises, it opted for damages claims as the most important catalyser of the private enforcement culture. In order to gain a clear picture on the existing private enforcement landscape in Europe, it commissioned a study on the conditions of claims for damages in case of infringement of EU competition rules.¹⁰⁰ Published in 2004, the study reflected a state of 'astonishing diversity and total underdevelopment'¹⁰¹ and proved such state of affairs to be attributed to the characteristics of national rules of evidence and procedure. This called for a further initiative in 2005 in the form of the *Green Paper*¹⁰² which set possible options for solving the recognized issues mirroring also the pragmatic goal of relieving public enforcement from part of its enforcement burden.¹⁰³ Matters which were the point of the attention included 'significant obstacles in different Member States to the effective operation of damages actions for infringement of EU antitrust law', due to the substantive and procedural rules belonging to domestic systems.¹⁰⁴ The analysed

¹⁰⁰ Emily Clark, Mat Hughes and David Wirth, 'Study on the conditions of claims for damages in case of infringement of EC competition rules: Analysis of Economic Models for the Calculation of Damages' (Ashurst 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf> accessed 7 June 2016.

¹⁰¹ In then twenty- five Member States there had only been around sixty judged cases for damages actions, twelve based on EU law. Damages for competition law infringements have been awarded by courts in only a few Member States (namely France, Germany, Italy, and the UK).

¹⁰² n 13. See also accompanying Commission Staff working paper SEC (2005) 1732 final <http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf> last accessed 1 July 2016.

¹⁰³ As a background and objectives of Green Paper it was stated that 'damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence). By being able effectively to bring a damages claim, individual firms or consumers in Europe are brought closer to competition rules and will be more actively involved in enforcement of the rules. The Court of Justice of the European Communities (ECJ) has ruled that effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss arising from an infringement of Articles 81 or 82 have the right to claim damages.' This pragmatic point was recognized by Goyder (n 63) 548.

¹⁰⁴ Green Paper (n 13), 4.

problematic included rules on the access to evidence, standard of fault, defining and calculating the quantum of damages, passing-on and indirect purchasers standing, collective actions and finally coordination of public and private enforcement.

This initiative was followed-up in 2008 by Commission's *White Paper*¹⁰⁵, throughout which it made proposals and specific policy measures focused on improving legal conditions, ergo suggestions on changing rules governing the matter within Member States.¹⁰⁶ The Commission did not fail to repeat that 'united in diversity' parole is not to be applied in case of damages actions within the EU. *Au contraire*, it mounts to legal uncertainty. Furthermore, evident as it may be that antitrust cases conceal particularities which demand a complex economic analysis and heavily obtainable evidence proving the infringement, *White Paper* added on the fact that these are 'often insufficiently addressed by traditional rules on civil liability and procedure'¹⁰⁷, as well as that the effectiveness of antitrust damages actions is to be achieved by a combination of EU and national measures. Although the Commission has proclaimed that the set objective is primarily about achieving compensatory justice for victims, it also directed to a deterrent effect of damages actions coming to the conclusion that both are safeguarding undistorted competition, 'an integral part of the internal market and important for implementing the Lisbon strategy.'¹⁰⁸ There was another point the Commission was urged to set principles for. In the picture of encouraging the role of private enforcement and already within the *Green Paper* it remained firm about preserving a strong public enforcement and subsequently controlling the evolution of its relationship with private, especially in order to protect it from harm the latter might inflict with its ambition to make a 'victim friendly' field free from hardships an individual suffers in his way to prove the alleged infringement. As a consequence, one of the crucial issues was addressed when the Commission called for an adequate protection system of leniency applicants in evidence disclosure process in order to prevent the

¹⁰⁵ Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM (2008) 165 final (hereinafter White Paper) and accompanying Commission Staff working paper SEC (2008) 404 final <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008SC0404>> last accessed 1 July 2016.

¹⁰⁶ For example, in certain Member States obtaining damages is conditional on fault of the infringer. In that aspect, the Commission states that the principles set by the ECJ suggest that any fault requirements under national law 'would have to be limited.' It further on sees 'no reasons to relieve infringers from liability on grounds of absence of fault other than in cases where the infringer made an excusable error.' Concrete suggestions on that point are derived from such point of view.

¹⁰⁷ Ibid 2.

¹⁰⁸ White Paper (n 105) 3.

latter to exercise a 'negative influence on the quality of [their] submissions, or even dissuade an infringer from applying for leniency altogether.'¹⁰⁹ Also, uncertainty in respect to the role of NCAs as public enforcement agents within the private enforcement scheme was also made a point within the *White Paper*. It was evident that a cooperation mechanism between public enforcement agents such as NCAs and national judiciary is a phenomenon that differs from one Member State to another¹¹⁰, so Commissions suggestions envisaged the effect of NCAs decisions in the course of private antitrust litigation to have the nature of an irrebuttable proof of the infringement in order to ensure consistent application, legal certainty and procedural efficiency throughout the EU.

4.2. Towards harmonisation of national rules- Damages Directive

At this point it was clear that facilitating damages claims is going to take place under Commission's leadership and under the flag of maintaining an effective competition in the EU. The suggestions the Commission put forward in both *Green Paper* and *White Paper* revealed that it will not allow the vagueness of the national procedural autonomy to rule on substantive and procedural rules for claiming damages, as long as it is EU competition law that is the base of the latter. The relatively poorly defined principles of equivalence and effectiveness will not suffice in the matter and contribute to an effective compensatory system within the private enforcement of EU antitrust rules. Thus, the Commission estimated the time to be ripe for measures which would harmonise but also amend national rules on evidence, procedure and remedies with a legislative proposal. Sure, the primary objective was to improve the legal environment victims of antitrust breaches are facing when chasing compensatory justice and create a level playing field free from danger such as forum shopping within the EU. The former objective having said to be inspired by Article 47 of the Charter of Fundamental Rights safeguarding the right to an effective remedy in case of violation of rights and

¹⁰⁹ Ibid 10.

¹¹⁰ Bernardo Cortese, 'The Difficult Relationship between Administrative Authorities and the Judiciary in Antitrust Private Enforcement' in Bernardo Cortese (ed), *EU Competition Law Between Public and Private Enforcement* (Kluwer Law International 2014) 102.

freedoms guaranteed under Union law.¹¹¹ However, Commission's attention was also directed towards regulating the terms of the public and private enforcement interplay, 'in particular balance the protection of our investigation tools, such as the leniency programme and the interest of the victims to access evidence.'¹¹²

Commission's initiative in the sense of harmonising national rules started already in 2009 with a pre-draft for a directive on damages actions for competition law infringements based on the *White Paper*. However, the latter was not adopted and was withdrawn the same year. One can seek the reasons in the need for a stronger support from the Member States.¹¹³ As well as the fact that the proposal was legally based on Article 103 TFEU only, in consequence of which the European Parliament merely had a consultative role. The possible inter-institutional crisis¹¹⁴ delayed further action until 2013, when the Commission published another proposal for a Directive¹¹⁵ tailored to remove 'shortcomings in the applicable legal frameworks in most Member States that make it excessively costly and difficult to bring actions [for damages]'.¹¹⁶ To have the envisaged effect, the proposals called for binding EU legislative measures.¹¹⁷ Finally in 2014, Commission's activism was crowned with Directive 2014/104/EU on antitrust damages actions¹¹⁸, which touches upon the harmonisation in the internal market and is finding its basis on Article 103 TFEU and Article 114 TFEU respectively. This secondary law instrument was born following an ordinary legislative procedure, hence a procedure in which the European Parliament has been involved.

¹¹¹ Alexander Italianer, 'Competition Law within a framework of rights and the Commission's proposal for a Directive on antitrust damage actions' (12th Annual conference of the Association of European Competition Law Judges (AECLJ), Luxembourg, 14 June 2013 <http://ec.europa.eu/competition/speeches/text/sp2013_06_en.pdf> accessed 17 June 2016.

¹¹² Ibid 4.

¹¹³ Kit Chellel, 'Brussels Flexes Its Muscles and Stalls Draft Directive on Competition Law' *The Lawyer* (London, 12 October 2009) <www.thelawyer.com/brussels-flexes-its-muscles-and-stalls-draft-directive-on-competition-law/1002259.article> accessed 17 June 2016.

¹¹⁴ Editorial Comments, "'One bird in the hand...'" The Directive on damages actions for breach of the competition rules' (2014) 51 CML Rev 1333, 1337.

¹¹⁵ Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' COM (2013) 404 final.

¹¹⁶ Commission, 'Frequently Asked Questions: Commission proposes legislation to facilitate damage claims by victims of antitrust violations' MEMO/08/216 <http://europa.eu/rapid/press-release_MEMO-13-531_en.htm> accessed 7 June 2016.

¹¹⁷ Jones and Sufrin (n 49) 1113.

¹¹⁸ See n 7.

Moreover, it was the first legislation enforcing EU competition rules in whose making the European Parliament participated.¹¹⁹

The Directive reaffirmed 'the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law'¹²⁰ and recognized the mentioned right for 'any natural or legal person – *irrespective of the existence of a direct contractual relationship* with the infringing undertaking.'¹²¹ Ergo, the Directive dealt with standing in a way that it allowed for any direct as well as indirect purchaser to claim compensation, consequently it introduced the tool of passing-on defence. Damages Directive was also very clear about the fact that it aims at full compensation of victims and does not opt for overcompensation, meaning granting punitive damages. In its attempt to diminish big discrepancies between national rules, it further sets harmonisation rules on the point of disclosure of evidence in proceedings related to an action for damages, particularly of evidence in the file of a competition authority, effects of final decisions of NCAs or review courts, limitation periods, joint and several liability of infringers and alternative avenues of redress like consensual dispute resolutions. It is crucial to note that Damages Directive extends its scope even to actions for damages taken on the basis of an infringed national competition law, provided that the latter is applied within the meaning of Articles 101 and 102 TFEU and on practices and agreements which may affect trade between Member States. Such an extension of application is explained on the well pushed argument that applying differing rules on such cases will inevitably mean an obstacle to the proper functioning of the internal market.¹²²

As it is a binding secondary EU law, the Directive leaves a time frame until December 2016 for the Member States to comply with it and reach its aims by bringing into force their own laws, regulations and administrative provisions.

¹¹⁹ Commission, 'The Damages Directive- Towards more effective enforcement of the EU competition rules' Competition policy brief, Issue 2015- 1

<http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf> accessed on 3 July 2016.

¹²⁰ Damages Directive, recital 12.

¹²¹ Ibid, recital 13, emphasis added.

¹²² Damages Directive, recital 10.

4.3. Implications of the Damages Directive

One of the things that stand out in the process towards the minimum harmonisation of rules regarding damages actions in the field of EU competition law is that the legislative procedure bore a final result – Damages Directive, in a fair speed, that being said bearing in mind that it took almost a decade to bring forward a legislative proposal in the first place, having it withdrawn in 2009 and proposed again in 2013. Throughout its case law, ECJ developed a negative harmonization network but what its activism also demonstrated was that limits defined by the term of 'national procedural autonomy' could not make up for the lack of legislature which would introduce a positive harmonisation.¹²³ At least not in all cases. One of the problematic issues arose in *Pfleiderer*¹²⁴ case in which ECJ left for the discretionary powers of national courts to decide on a case-by-case basis whether evidence acquired through leniency programmes can be disclosed to support plaintiff's action for damages. The aftermath showed great tension created between public and private enforcement because enhancement of the latter revealed its harmful face towards the former. Namely, a possibility of disclosing information acquired through leniency programme and using them in the disadvantage of the companies cooperating with NCAs in such a way, might deter the latter actors from cooperating in the future. This was especially the view of the Commission who finds the self-incriminating statements to be of extreme importance for dealing with hard-core cartels and finally the public enforcement of competition law.¹²⁵ Logically, the Commission reacted quickly and with the proposal for and Damages Directive itself, it fully protected leniency statements making them exempted from the disclosure of evidence. Commission's given support to public enforcement and the value it adds to it, is also further visible within the Directive. Final decisions of a NCA on an infringement will serve as an irrefutable proof before the courts of the same Member State, while in the other it will constitute 'at least a *prima facie* evidence'. This clearly speaks in support of the 'follow-on' damages actions, private claims which find their basis on the public authorities' findings and thus avoid

¹²³ Lorenzo F. Pace, 'The Court of Justice „Anitrust Enforcement Negative Harmonisation Framework" and the *CDC* and *Pfleiderer* Judgement: „Another Brick in the Wall" ' in Bernardo Cortese (ed), *EU Competition Law Between Public and Private Enforcement* (Kluwer Law International 2014) 244.

¹²⁴ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

¹²⁵ See n 116.

the difficult task of proving the infringement themselves. It could be observed that such solutions on access to evidence emphasize the importance public enforcement has and will continue to have in the lives of the victims harmed by the infringements and in competition law generally speaking. Such events makes one examine the position national court has in such an enforcement scheme. Namely, if we add to it its obligations confirmed in *Delimitis* and *Masterfoods*¹²⁶ and codified in Article 16 of Regulation 1/2003, that it must avoid conflicting with the Commission when giving a decision in a case which are already or may subsequently be the subject of a decision by the Commission, the fact that national court's decision cannot deviate from the one of the Commissions, leaves a strong impression that in the relationship of public and private enforcement, the former enforcer is 'first among equals'.¹²⁷ The role of public enforcers within EU competition law has thus been underlined and another border the national courts have to respect when exercising their power to enforce, has been drawn.

This firstly proves that the Commission chose carefully which measures to put forward to harmonise through Damages Directive and that in doing so it was motivated by the priorities within its own internal market agenda, and therefore that safeguarding the effectiveness of public enforcement was an incumbent part of the legislative move.

Secondly, within the Directive, it incorporated measures for which it could be sure that would live through the political process which held its eye on the national procedural autonomy. So despite the fact that the Directive was born with a loud aim of correcting the state of uneven enforcement of the damages right and uncertainty of it in an uneven playing field, such an approach was not applied to all aspects of an action for damages. The notion of causal relationship as well as the condition of fault were left to further scrutiny of the *Rewe*¹²⁸ formula of equivalence and effectiveness, despite Commission's instrumentalist approach to these matters within the *White Paper*.¹²⁹

¹²⁶ Case C-344/98 *Masterfoods* [2000] ECR I-11369.

¹²⁷ See Siun O'Keefe, 'First among equals: the Commission and the national courts as enforcers of E.C. competition law' (2001) 26(3) EL Rev 301 (case comment).

¹²⁸ Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

¹²⁹ See n 106.

Furthermore, it surely cannot be a coincidence that not only did the Commission opt for a directive as a harmonisation tool which leaves the Member States the freedom to choose the manner of implementation, but also that the matter of collective redress as well as of the quantification of harm were left out of it. On the latter, the Commission opted for an approach through which it would provide 'assistance' to Member States by developing soft law which would touch upon these sensitive points within a private antitrust litigation, this including a recommendation of non-binding principles for collective redress mechanisms for Member States¹³⁰ and a practical guide on the quantification of harm for damages to lend assistance to domestic courts.¹³¹

Thirdly, one must not forget that the right to claim damages is not the only basket offered to individuals by private enforcement of EU competition law, yet it was chosen as an essential part of the jigsaw called 'effective private enforcement of antitrust rules'. The preparatory work created before the Damages Directive displayed a number of issues on which national rules differed and thus, as proved, created legal obstacles which discouraged individuals to compensate damage they suffered. Yet, the path towards harmonisation was carved by compromises which the Damages Directive represents. In such a form it is questionable to what extent will it succeed in its ambitions to ensure a level playing field, increase legal certainty and approximate Member States' rules governing actions for damages in order to 'improve the conditions for consumers to exercise the rights that they derive from the internal market' and finally ensure maximum effectiveness of the competition rules.¹³² In 'stand-alone' actions in which the individual does not 'piggy back' on the discovery work of public enforcers, the actor is still dependant on the assessment of the national judiciary of the requirement of proportionality in disclosure following the request. Such a state of things leaves expectations that within such an art of action, purely private, the

¹³⁰ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60.

¹³¹ Commission, 'Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' [2013] OJ C167/19; Commission, 'Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' SWD(2013) 205 <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf> last accessed 1 July 2016.

¹³² Damages Directive, recital 9.

claimants will (still) have 'an uphill struggle in pinpointing and quantifying the harm they have suffered'¹³³, and that in its intentions to avoid unfavourable set of procedural rules it will do forum shopping.

Fourthly, the state of affairs logically leaves one with expectations of augmented number of questions referred to the ECJ in order to question the compliance of national rules with the twin principles of equivalence and effectiveness in the matters not regulated by EU rules. In that regard, one must not forget that it is an EU right to damages that is left on the hands of national legislators and national courts to protect so its enforcement will continue to stay a matter of EU law generally speaking.

Considering the started trend of harmonisation, further legislation seems most probable. The matter of question is in which time and on what points will the Commission temper its activity in order to push it successfully through in the legislative process. In the pursuit towards effective enforcement of EU competition law, an affirmative answer to the question whether the national legislative landscape would have to change in the process, seems inalienable.

¹³³ Anneli Howard, ' Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions' (2013) 4 Journal of European Competition Law & Practice 455, 463.

5. Conclusion

Development of private enforcement of EU antitrust rules was facilitated by both the ECJ as well as the Commission. The historical background of the foremost judicial activism of the Court of Justice left no doubts about the existence of rights deriving directly from articles 101 and 102 TFEU. However, the development path was rather long and throughout the dominance of public enforcement strong. It took from 1974 *Sabam* ruling until *Courage* case in 2001 to have the direct effect of 101 and 102 TFEU explained to bear an individual's entitlement to claim compensation before domestic courts, for the harm suffered as a result of an infringement. The existence of an EU based right to damages compensation continued to be confirmed in the subsequent case law governing antitrust infringements.¹³⁴

Nothing was the same after *Courage*. Looking strictly EU competition law, it was a perfect piece of the missing puzzle in Commission's attempt to modernise competition law enforcement and introduce reforms. The Commission became eager to facilitate the effectiveness of private enforcement and a great reason for it was a decision to divide the work and focus its limited resources on finding (only) the most serious infringements. Damages actions thus became a strong instrument through which it saw the possibility of raising the effectiveness level of competition law. The Commission did not waste time on acting upon the matter, and with conducted studies, impact assessments and other papers revealing the fact that diverse solutions within national legal systems of Member States do but the opposite of stimulating private enforcement of competition law through actions for damages. It is possible that the latter conclusion would have been reached in the Court's case law as well, under the requirement of effectiveness in respect to a remedial protection of an EU right, however the Commission wanted to prepare the field for its final legislative proposal it would bring on the table under its own terms, so with both *Green Paper* and *White Paper* it addressed the problematic issues proposing changes to national systems. And what a better sign of legitimacy to do the latter than acting in the name of protecting the victims of uncompetitive conduct.

¹³⁴ Case C-199/11 *Europese Gemeenschap v Otis NV ("Elevators")* [2012] ECR I-000, Case C-557/12 *Kone AG and others* [2014] ECR I-0000.

Still, a positive harmonisation measure was long awaited. Another decade of case law and a decade of Commissions proposals until a compromise was finally reached in 2014 within the Damages Directive, aimed to set minimum protection for the individuals suffering harm from competition law infringements.

Thankfully the Directive brought clarifications as to some controversial points (e.g. leaving punitive damages out of the damage equation) and at some ways it did make damages actions more approachable to potential plaintiffs (e.g. wide rule on standing, presumption that cartel infringements cause harm). What it also revealed is the fact that public enforcement still holds a prominent role within the enforcement scheme. A firm stand point on evidence collected within the leniency programme demonstrates Commission's ceiling in protection of individuals rights to compensation. This especially if one notes that ECJ acted differently when faced to balance these interests.

Since the Directive was a crown of initiatives aiming at changing national procedural rules for the greater good of undistorted internal market, it had to be reached with a consensus which led to the consequence that now all the desired issues were encompassed. Such a nature of private enforcement of EU competition law in this aspect shows that its further development will be taken with carefully measured steps because that will be the price of making some, so patience will be incumbent. However, further development is inevitable as well as necessary. The ball started rolling from *Courage* time so the Directive, although worth applauding for some points, if left as a unique legislative measure, will leave the impression of an 'unfinished job'.

In the track of future developments one can therefore expect the soft law on issues such as collective claims and damages quantification to convert to binding points. For issues not regulated by EU law the filter of *Rewe* formula will always be active, turning once again all eyes on the ECJ.

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